United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

74-2053-4

To be argued by
SHELDON OLIENSIS

United States Court of Appeals

For the Second Circuit

Docket Nos. 74-2053—74-2054

GEORGE KATZ,
Plaintiff-Appellee,

—against—

REALTY EQUITIES CORPORATION OF NEW YORK *et al.*,
Defendants-Appellees,

and

KLEIN, HINDS & FINKE

and

ALEXANDER GRANT & COMPANY,
Defendants-Appellants.

KENNETH I. HERMAN, Trustee
F/B/O SHERIL ESTA KUPFER,
Plaintiff-Appellee,

—against—

REPUBLIC NATIONAL LIFE INSURANCE COMPANY *et al.*,
Defendants-Appellees,

and

KLEIN, HINDS & FINKE

and

ALEXANDER GRANT & COMPANY,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CERTAIN DEFENDANTS-APPELLEES

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The names of all defendants-appellees on whose behalf this brief is submitted are set forth on pages 8 and 9 hereof.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Preliminary Statement

This brief is submitted on behalf of Republic National Life Insurance Company ("Republic"), Realty Equities

Corporation of New York ("Realty"), Peat, Marwick, Mitchell & Company ("Peat Marwick"), Westheimer, Fine, Berger & Company and seven individuals,* who are defendants in these two actions and in virtually all of the related actions, which have been assigned by the Judicial Panel on Multidistrict Litigation to the Honorable Milton Pollack for coordinated or consolidated pre-trial discovery. Defendants-appellees urge this Court to affirm the order of the District Court, dated June 24, 1974, directing the filing, for pre-trial purposes only, of a consolidated complaint.

Issue Presented

Did the District Court abuse its discretion in ordering the filing of a consolidated complaint where—

> —17 separate actions were pending, all involving a single set of operative facts and allegations duplicating verbatim the complaint filed by the Securities and Exchange Commission on March 8, 1974; and
>
> —The Court made clear in its order that the single consolidated complaint was to serve simply as a pre-trial mechanism to avoid wasted time and effort and was "without prejudice to the use of the individual complaints as they stand now at a consolidated trial, and certainly without prejudice to their use in individual trials if that should eventuate." (98a).**

While irrelevant to the legal question here involved, defendants-appellees note that the consolidated complaint

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* The individual defendants-appellees are Theodore P. Beasley, Ronald R. Beasley, Robert P. Brady, Thomas G. Nash, Jr., Clarence J. Skelton, Samuel P. Smoot and Neal N. Stanley.

** Citation references, unless otherwise noted, are to the Joint Appendix.

has been prepared and was served on September 10, 1974; an amended consolidated complaint was served on October 15, 1974; answers and motions directed to the amended consolidated complaint were thereafter served; and discovery under the amended consolidated complaint has now been in progress for two months.

ARGUMENT

The District Court's Ordering of a Consolidated Complaint Not Only Was Plainly Within Its Power, But Constituted a Wise and Proper Exercise of Its Discretionary Powers to Insure the Effective Administration of a Massive and Complex Litigation.

Appellants Klein, Hinds & Finke ("KHF") and Alexander Grant & Co. ("Grant") frame their issue on appeal in terms of whether the District Court lacked "authority" to order the filing of a consolidated complaint. (Appellants' Brief, p. 2; see also *id.*, p. 7.) The Court's general power to order the filing of a consolidated complaint in appropriate circumstances, however, is beyond question and was expressly recognized by this Court in *Garber* v. *Randell.** The actual issue presented by KHF and Grant, however it may be semantically draped, is whether the District Court abused its discretion in ordering a consolidated complaint herein. In defendants-appellees' view, a consolidated complaint was absolutely essential in order to prevent the litigation from becoming bogged down in a procedural morass.

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* 477 F.2d 711, 716-17, especially p. 717, n.4 (2d Cir. 1973). Appellants' citation of *MacAlister* v. *Guterma*, 263 F.2d 65 (2d Cir. 1958), is difficult to understand, since this Court, in *Garber*, made clear that *MacAlister* did not prohibit a consolidated complaint in actions such as these, where the claims are virtually identical. (See 477 F.2d at 717, n.4.)

Republic, Realty and Peat Marwick, for example, were named as defendants in, respectively, 16, 15 and 14 of the 17 consolidated actions. Had the consolidated complaint not been ordered, each would have been required to prepare and file multiple answers to what is, in substance, the same complaint.* The mechanical problems alone would have created an enormous and utterly needless burden on defendants and would have inundated the District Court in a blizzard of purposeless paper. Had discovery then proceeded—however coordinated or accommodated—with 17 different plaintiffs each pursuing his own interpretation of his individual complaint, the litigations would rapidly have become ensnarled in a web of procedural complexities. The District Court's order went far toward bringing order out of certain chaos.

As KHF and Grant themselves point out, they are named in only three of the 33 counts of the consolidated complaint (Appellants' Brief, p. 5), and, under the Court's order, were not called upon to answer any of the 30 counts in which they are not included (93a-94a). As such, their task would seem to be a relatively simple one. Appellants nonetheless claim two supposed sources of prejudice to them. (Appellants' Brief, p. 6.) Both are non-existent.

First, KHF and Grant state that the classes defined in the consolidated complaint are broader than the classes defined in the individual complaints, since the consolidated complaint refers to holders of "securities," while the individual complaints in which appellants were named as de-

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* The seven individual defendants-appellees (Messrs. T. Beasley, R. Beasley, Brady, Nash, Skelton, Smoot and Stanley) each filed a separate answer to the amended consolidated complaint. Had they been required to respond separately to each of the 14 complaints in which they were named as defendants, 98 answers would have been filed for this group of defendants alone.

fendants refer only to holders of "common stock." Defendants-appellees take no position at this time on the propriety of expanding the classes defined in the individual complaints. That question, however, provides no basis whatever for attacking the Court's order appealed from, which in no way directed or authorized plaintiffs to expand the classes. The classes have not yet been defined by the District Court—plaintiffs' motion for class action certifications was made on December 16, and is now pending—and KHF and Grant, as well as all other parties, will have ample opportunity to be heard on the proper definition of the classes.

Appellants' second point is equally groundless. The technique of preserving cross-claims without the necessity of formal filing is a salutary and sensible procedural reform, previously used by the District Court in the District of Columbia in the *National Student Marketing* securities litigation.* Furthermore, as a practical matter in an action of this kind, any knowledgeable defendant would, simply as a safety precaution, routinely file cross-claims wherever any possibility of liability over existed. With more than 30 defendants, the combinations and permutations of such cross-claims and answers to them would be staggering. KHF and Grant, like the other defendants, have been saved the burden of filing multiple cross-claims and then responding to the ones filed against them. To claim that relief from such a burden is prejudicial is simply divorced from reality.

From time to time in their brief, KHF and Grant refer to the supposed "variety of claims" asserted in the actions. (See, *e.g.*, Appellants' Brief, pp. 2, 7.) Even if the claims

* Order of Judge Barrington D. Parker filed on July 26, 1973 in the United States District Court for the District of Columbia. A copy of Judge Parker's order will be handed up to the Court at the oral argument of this appeal.

here were not virtually identical—and they are—disparity among them would create no obstacle to consolidation.

Thus, in *Stein, Hall & Co.* v. *Scindia Steam Navigation Co.*, 264 F. Supp. 499 (S.D.N.Y. 1967),* then District Judge Mansfield ordered the consolidation of three actions, all arising as the result of the flooding of a pier. Judge Mansfield noted that, "proof of the original condition of each shipment, and the alleged damage to it, will be different for each party plaintiff" (264 F. Supp. at 501) and that there might be "some different wrinkles in the arrangements between each shipper and carrier, and between each carrier and International [an impleaded respondent]." (*Ibid.*) Nonetheless, it was evident that "the fundamental fact and law issues will be substantially similar, if not identical" and that the claims stemmed "from the same flood on the same pier." (*Ibid.*)

And in *Gerber Products Co.* v. *Beech-Nut Life Savers, Inc.*, 25 Fed. Rules Service 42a.1, Case 1 (S.D.N.Y. 1958), Judge Weinfeld ordered consolidation of two cases, even though each contained a legal issue not involved in the other and one appeared to be triable to a jury, while the other was triable to the Court. The difference in claims, Judge Weinfeld ruled, "does not militate against a consolidated trial. There are enough common and related issues of fact and law with respect to all claims to indicate it would be a needless waste of effort by the litigants and of judicial manpower to require two separate trials."

The indisputable fact is, however, that the actions are all identical progeny of a single source—the SEC com-

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* This case, and the *Gerber* case cited thereafter, dealt with consolidation generally, not specifically with a consolidated complaint. Their rationale, however, appears equally applicable in both situations.

plaint.* For demonstration, we need look no further than the two complaints in which appellants were served as defendants, which are set out in full in the Joint Appendix. The *Katz* complaint was brought on behalf of Realty stockholders; the *Herman* complaint, on behalf of Republic stockholders. Nonetheless, after the introductory formal paragraphs, the next 25 pages of both complaints—including the prayers for relief—are not merely "substantially identical," but verbatim. (Compare *Katz* complaint, Paragraphs 26-112 and prayer for relief (7a-37a), with *Herman* complaint, Paragraphs 28-114 and prayer for relief (45a-76a)). All that the District Court order did was to put back together what the plaintiffs had split asunder—the SEC complaint.

KHF and Grant's real objection to the consolidation is probably attributable to their feeling that they do not belong in this litigation at all. (See, *e.g.*, Appellants' Brief, pp. 5-6.) Their remedy, however, is not to attempt to th· ·st the litigation into chaos for all other litigants, but to move to dismiss—and the District Court explicitly invited them to do just that more than six months ago. (See 95a-96a.) One other defendant accounting firm, which took a similar position, successfully made just such a motion. KHF and Grant, instead, have pursued this appeal.

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* KHF and Grant themselves point out this fact in the two actions in which they are defendants and were served: "Except for the addition of Grant and KHF as defendants, the *Katz* and *Herman* complaints, which were filed within ten days of the SEC complaint, are virtually identical to it." (Appellants' Brief, p. 3.)

CONCLUSION

Defendants-appellees respectfully submit that the District Court's order appealed from should be in all respects affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE KATZ Plaintiff-Appellee, -against- REALTY EQUITIES CORP. OF NEW YORK, et al., Defendant-Appellees, and KLEIN, HINDS & FINKE AND ALEXANDER GRANT & COMPANY, Defendant-Appellants.	74-2053-4
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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT THATCHER, being duly sworn, deposes and says that he is employed by the law firm of Kaye, Scholer, Fierman, Hays & Handler, is over the age of twenty-one years and not a party to this action.

1. On the 3rd day of January, 1975, deponent served two true copies of Brief for Certain Defendant-Appellees, annexed hereto, by depositing same, enclosed in sealed postpaid wrappers in the post office box regularly maintained by the U.S. Postal Service at 425 Park Avenue, New York, New York, addressed to the attorneys on the attached list, these being the addresses designated by said attorneys for that purpose upon the preceding papers in this action.

Robert Thatcher
Robert Thatcher

Sworn to before me this
3rd day of January, 1975

David A. Maher
Notary Public

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